Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC.,

Petitioners,

v.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY,

Respondents.

On Petition for A Writ of Certiorari to The Court of Appeals of Texas for the Fifth District of Texas at Dallas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 12(2) of the Securities Act of 1933 is applicable to a privately negotiated resale of all the stock of a corporation.

2. Whether Section 12(2) of the Securities Act of 1933 entitles a purchaser to rescind a privately negotiated stock transfer agreement, and recover the full purchase price, even where the purchaser has liquidated the acquired corporation and there can be no restoration of the *status quo ante*.

3. Whether the anti-waiver provision of the Securities Act of 1933 prohibits parties to a stock transfer agreement from releasing existing but unknown claims arising under that Act.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Texas Court of Appeals are identified in the caption. Pursuant to Supreme Court Rule 29.1, petitioners state that all parent companies and subsidiaries (except wholly owned subsidiaries) of the corporate parties are as follows:

1. Petitioner Anheuser-Busch Companies, Inc. partially owns Budweiser Japan Company, Ltd. (through a wholly owned subsidiary) and St. Louis National Baseball Club, Inc.;

2. Petitioner Campbell Taggart, Inc., which is wholly owned by Petitioner Anheuser-Busch Companies, Inc., partially owns Europate S.A.

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IN THE

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OCTOBER TERM, 1994

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC.,

Petitioners,

v.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS

Campbell Taggart, Inc. and Anheuser-Busch Companies, Inc., petition for a writ of certiorari to review the judgment of the Texas Court of Appeals in this case, in which the Texas Supreme Court denied discretionary review.

OPINIONS BELOW

The orders of the Texas Supreme Court (Pet. App. A) are not reported. The opinion of the Texas Court of Appeals (Pet. App. B) is reported at 858 S.W.2d 928. The judgment of the 160th District Court of Texas, Dallas County (Pet. App. C) is not reported.

JURISDICTION

The judgment of the Texas Court of Appeals (Pet. App. A36-37) was entered on June 9, 1994. The order of the Texas Supreme Court denying discretionary review was entered on March 30, 1994, and the order overruling motions for rehearing was entered on June 2, 1994. Pet. App. A1-2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1988).

STATUTORY PROVISIONS INVOLVED

Section 12(2) of the Securities Act of 1933, 15 U.S.C. §77*l* (2) (1988), provides:

> Any person who ...(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such

security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 2(10) of the Securities Act of 1933, 15 U.S.C. §77b(10) (1988), provides:

> [U]nless the context otherwise requires - *** [t]he term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security, except that
>
> > (a) a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of [Section 10]) shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of [Section 10] at the time of such communication was sent or given to the person to whom the communication was made, and
> >
> > (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of [Section 10] may be obtained and, in addition, does no more than identify the security, state

> the price thereof, state by whom orders will be executed, and contain such other information as the Commission, by rules or regulations deemed necessary or appropriate in the public interest and for the protection of investors, and subject to such terms and conditions as may be prescribed therein, may permit.

Section 14 of the Securities Act of 1933, 15 U.S.C. §77n (1988), provides:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

STATEMENT

1. This case arises out of Petitioner Campbell Taggart Inc.'s sale of Herby's Foods, Inc., to Respondent Summit Coffee Company. (We hereafter refer to Petitioner Campbell Taggart as "Seller" and to Respondent Summit Coffee Company as "Buyer" or "Summit.") The sale was effected by a privately negotiated stock purchase agreement. Respondent Dunnam-Snyder Company, parent of Summit, guaranteed Summit's obligations under that agreement. Pet. App. A4-6.[1]

Herby's stock, the subject of this litigation, was never issued to the public; it exchanged hands only through the private sale of an on-going business. Campbell Taggart had

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[1] Petitioner Anheuser-Busch Companies, Inc., is the parent of Petitioner Campbell Taggart, Inc.

purchased Herby's in 1981 for investment purposes and ran the business until it was sold to Buyer. S.F.II at 128.[2] Buyer initiated the sale by approaching Seller in the spring of 1987 with an interest in buying Herby's, a business that made sandwiches for distribution to convenience stores. S.F. III at 113; IV at 251-54. After several discussions, the parties signed a letter of intent in August 1987, agreeing to the sale in principle. Exh. Ely 22;[3] S.F. II at 132, 137. Under the letter of intent, Buyer was entitled to inspect Herby's business records and premises, and it did so. Exh. Ely 22 at ¶ 10; S.F. III at 156-57; IV at 254-55; 269-71; VII at 920-21, 945.

After extensive negotiations, the parties closed the sale by signing the stock purchase agreement in October 1987. Under the agreement, the purchase price of Herby's was to be adjusted three months after the sale to take account of any liabilities that were outstanding but not disclosed at the time of sale, or any adjustments to the closing inventory. The three months between closing and price adjustment were intended to provide ample time for the parties to acquire all the information needed to make the adjustment. If the parties could agree to a price adjustment, either to raise or lower the price, they were to execute mutual releases in connection with that adjustment. Otherwise, each had the right to pursue its full legal remedies. Pet. App. A4-6. It is undisputed that Summit operated the company during the three-month adjustment period and had full control of Herby's and its books and records. Pet. App. A5; S.F. III at 96.

As the price adjustment date approached, the parties disagreed about the amount of the price adjustment but

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2 The Statement of Facts, which is the trial transcript, is cited as "S.F."

3 Exhibits retained their deposition designations at trial.

chose to settle the matter rather than litigate it. In February 1988, the parties signed a settlement and mutual release of "any and all causes of action of any nature whatsoever, at common law, statutory or otherwise," that any party has "or might have, known or unknown, now existing or that might hereafter directly or indirectly be attributable to . . . all past, present and future obligations" in connection with the price adjustment sections of the Agreement. Respondents Summit and Dunnam Snyder took $435,135.03 in consideration for their release of all claims. Pet. App. A6.

2. When Buyer failed to make certain payments under the stock purchase agreement, Seller sued Buyer in state court in 1988, to recover moneys owed. Buyer counterclaimed, alleging, among other things, that Seller had violated Section 12(2) of the 1933 Securities Act, by materially misrepresenting the extent of Herby's liabilities relating to outstanding insurance claims and the terms of a truck lease. Pet. App. A6.[4] Buyer also filed a separate suit in federal court, alleging that the same misrepresentations violated Section 10(b) of the 1934 Securities Act. *See Summit Coffee Co. et al. v. Campbell Taggart, Inc.*, No. C-910519R, (N.D. Tex. Mar. 31, 1991.)[5]

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[4] In dispute were 21 insurance (workers' compensation) claims, which, though not listed individually, were fully represented in the aggregate liability amounts disclosed before the sale. Nevertheless, Buyer has never paid a penny on these 21 claims; Anheuser-Busch assumed full responsibility for processing and payment of the claims. S.F. III at 163-64; VII at 943-44. As to the truck lease liabilities, the Seller claimed that it had been misled to believe that a weekly charge for rental of trucks was actually a monthly charge. For three months after the sale, however, Seller paid the correct weekly charges, week after week, before signing the release of claims. S.F. III at 181-82, 196.

[5] The suit was originally filed, virtually simultaneously with the state court action, in the Southern District of Texas, No. C-88-300,

The instant state court action was tried before a jury. At trial, it was undisputed that there was nothing left of Herby's but its paper stock. At the time of the sale, Herby's had 259 employees, a fleet of 99 trucks, and a customer base of 4700 convenience stores. S.F. III at 100-02. At the time of trial, Herby's had one employee, no trucks, and not a single customer. *Id*. The management team that the Buyer had established for Herby's placed the business in voluntary bankruptcy in September 1989 in order to sell all of the assets. S.F. III at 98-102. William Snyder, an officer and director of both Summit and Herby's, admitted unequivocally at trial that the Seller was not the cause of Herby's bankruptcy, and that all material events leading to Herby's demise occurred after the sale, when the buyers were in complete control. S.F. III at 120; *See also* S. F. III at 109-10; 134-36; 142; 146-47.

Although the jury found that the Seller had made material misrepresentations in the sale of Herby's, it also found that Summit had suffered $0.00 damages as a result of any misrepresentation, and that the Buyer could not restore the *status quo ante*.[6] Pet. App. A7. On these findings, the trial court awarded Summit rescission; specifically, the court ordered the Seller to refund the full purchase price of $5.5

Oct. 21, 1988, and then dismissed and refiled in the Northern District, where it is still pending. That case has been stayed pending final action in the instant proceeding. *See* Orders of October 20, 1992, and July 15, 1994.

[6] Dunnam Snyder, the parent company and guarantor, received no award under the securities laws. The court of appeals reversed the trial court's award of actual and punitive damages for negligent misrepresentation to Dunnam Snyder because the company had settled and released all claims. Pet. App. A28-29.

million, although Buyer could not return the company it bought. Pet. App. A22-23.[7]

3. Seller argued on appeal, *inter alia*, that the trial court erred because 1) section 12(2) of the 1933 Securities Act did not apply to the privately negotiated resale of Herby's; 2) in any event, rescission was unavailable given the jury's finding that the Buyer could not restore the *status quo ante*; and 3) Summit had released all of its claims, including those under the 1933 Securities Act.

The Texas Court of Appeals ruled that Section 12(2) of the 1933 Securities Act applied to the privately negotiated sale of Herby's. The state court generally agreed with the ruling of the Third Circuit in *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682, 687-93 (3d Cir.), *cert. denied*, 112 S. Ct. 79 (1991), which held that Section 12(2) applies only to initial offerings of securities, not to an after-market transaction, such as the sale of Herby's. Nevertheless, the court carved out an exception for the secondary sale by one owner of all the stock of a company.

As justification for its secondary-market exception, the court relied solely on two passages from the House Report of the 1933 Act. Pet. App. A25-26. In the first passage, the House Committee explained that the Act applied only to "new offerings" and not to "the ordinary redistribution" of securities, except where such redistribution "takes on the characteristics of a new offering." *Id*. at A25, *quoting* H.R. Rep. No. 85, 73rd Cong., 1st Sess. 5 (1933) (hereinafter H.R. Rep. No. 85).

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[7] The trial court denied Seller's Motion for Judgment and Motion for New Trial, which set forth its contentions regarding the 1933 Securities Act. *See* Pet. App. C.

In the second passage cited by the court, the House Report explained what such a "redistribution" would be. In explaining the term "underwriter," the Report describes a situation in which one or a select group of individuals who own all of the stock of a corporation decide "to dispose of their holdings and to make an offer of this stock to the public." H.R. Rep. No. 85 at 14. The lower court quoted a lengthy passage from the Report, but focused on the control being exercised and the information possessed by the seller. The court completely ignored, however, that this passage refers only to distributions and redistributions of stock **to the public.** *Id.* at 13-14. Based entirely on these passages, the court applied Section 12(2) to the **private** sale of Herby's in the secondary market. Pet. App. A26-27.

The state court of appeals further held that Summit was entitled to rescission of the private stock purchase agreement, despite the jury's finding that Buyer could not restore the *status quo ante*. In the court's view, the violation of Section 12(2) of the 1933 Act entitled Summit to a return of the full price it had paid for Herby's, even though the company had been a valuable asset at the time of sale, and even though Buyer, with no involvement by the Seller, had bankrupted and liquidated the company, leaving nothing but worthless stock to return to the Seller. Pet. App. A22-23.

Finally, although the parties had negotiated a release of all of the claims pressed by Buyer in this case, the court refused to permit release of the federal securities claims. The court held that, as a matter of law, based on the clear language of the release itself, the parties intended to release **all** of Buyer's existing claims -- known or unknown -- including those under the Securities Act. Pet. App. A11-12. Notwithstanding the parties' clearly-expressed intent, the Texas court held that the anti-waiver provision of the 1933 Securities Act, 15 U.S.C. 77n, precluded release not just of future claims but even of extant claims if they were

unknown to Buyer at the time of the release. Pet. App. A11-12.

4. Seller filed an Application for Writ of Error to the Supreme Court of Texas, raising its contentions regarding the 1933 Securities Act in Points of Error 1, 2, and 3. The state supreme court summarily denied the application, without explanatory remarks. Pet. App. A2. Seller's Motion for Rehearing addressed the same three issues under the Securities Act, but the supreme court summarily denied rehearing. Pet. App. A1.

REASONS FOR GRANTING THE PETITION

SUMMARY

The Court should grant this petition for the same reasons it granted review in *Gustafson v. Alloyd Co.*, No. 93-404, *cert. granted*, 114 S. Ct. 1215 (1994).[8] This case presents the identical issue regarding the applicability of section 12(2) of the 1933 Securities Act to a private sale of all of the stock of a company. A ruling in *Gustafson* that such a sale is not subject to the relaxed proof requirements and rescissory remedy of section 12(2) would be dispositive here. This

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[8] Summit sought rescission under both section 12(2) and its Texas counterpart, section 33(A)(2), Tex. Rev. Civ. Stat. Ann. art. 581-33A(2)(Vernon Supp. 1993). The Texas court of appeals interpreted the federal act; it made no independent analysis of the Texas securities statute, merely noting that it "should be applied in accordance with our interpretation of the federal statute." Pet. App. A27. *See also* Pet. App. A10-11; A22-23. Texas courts have routinely followed federal securities law in interpreting state law provisions. *See, e.g., Star Supply Co. v. Jones*, 665 S.W.2d 194, 196 (Tex. App. -- San Antonio 1984, no writ); *First Municipal Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart*, 648 S.W.2d 410, 414 (Tex. App. -- Dallas 1983, writ ref'd n.r.e.).

case, in fact, presents even more compelling support for that ruling than *Gustafson* itself.

To apply section 12(2), with its automatic rescission remedy, to private transactions like the one here would produce two results that Congress never intended. Specifically, it would place an extraordinary fiduciary burden on private sellers and provide a windfall remedy to private buyers. Rescission here would mean that a sophisticated purchaser of all of the stock of a company, represented by counsel in a fully negotiated private sale, could take the company into quick financial ruin and then simply get all of its money back to start again. It would mean that a seller, having privately sold a company undisputedly worth $5.5 million, and having paid nearly half a million dollars to obtain settlement and release of all claims, could be forced to return the entire purchase price, without getting the company back. It would mean that any seller of a business would have to meet the fiduciary standards of a trustee, intended to be applicable only to securities transactions in which one party does not have access to the information necessary to a level playing field.

If section 12(2) is unavailable here, it does not mean that a defrauded purchaser has no remedy under the securities laws. As Summit has recognized by filing suit in federal court, section 10(b) of the 1934 Securities Exchange Act provides an appropriate remedy for a buyer in Summit's position. Congress addressed secondary-market stock sales in the 1934 Act, which affords a fully adequate federal remedy for stock misrepresentations without converting the seller of a business into a fiduciary of its buyer. To permit recovery under the 1933 Act as well would make nonsense of the statutory scheme and gut the 1934 Act's requirements of proof of scienter by the seller, reliance by the purchaser, and causation of damages.

There is no hint in the statutory language, structure, or legislative history of the 1933 Securities Act to suggest that Congress ever intended that Act to govern the private purchase of an incorporated business. To apply the 1933 Act to such private transactions would provide the purchaser of a company with an unjustified "ace in the hole." The lower court in this case, for example, ordered the seller to refund the full sales price of a company, even where:

- the purchaser took an on-going business, ran it into the ground and sold off all assets **but** the worthless stock, thus eliminating any possibility of restoring the seller to the *status quo ante*;

- the purchaser suffered no damages from the seller's misrepresentations, the bankruptcy indisputably had nothing to do with the seller, and the purchaser had full access to all company books and accounts while negotiating the final sales price of the business; and

- as they negotiated the final sales price, with full disclosure of company records, the parties settled all claims, including any claims under the federal securities laws, and the buyer received nearly half a million dollars for its release.

For the reasons discussed below, there is no justification in the statute or public policy for transforming the 1933 Act into an insurance policy for a party who fully negotiates the private purchase of a business.

1. The language, structure, and legislative history of the 1933 Act, as well as the overall scheme created by the 1933 and 1934 Acts, make clear that section 12(2) was

never intended to apply to aftermarket privately negotiated securities sales such as the one at issue here. Section 12(2), like most of the rest of the 1933 Act, was enacted to protect the investing public by remedying abuses in the process by which new issues of securities are distributed. Section 10(b) of the 1934 Act, by contrast, was designed to regulate aftermarket trading, including privately negotiated transactions like the one at issue. As this Court recently stated: "The 1933 Act regulates initial distributions of securities, and the 1934 Act for the most part regulates post-distribution trading." *Central Bank, N.A. v. First Interstate Bank N.A.*, 114 S.Ct. 1439, 1445 (1994).

Section 12(2), by its very terms, is limited in scope to initial public offerings. It applies only to a sale of a security "by means of a prospectus or oral communication." When Congress used this language, it was explicitly recognizing that only a particular type of sale is covered. If the section were meant to apply to all securities sales, there would have been no point to using this language at all. *See* Elliott J. Weiss, *The Courts Have it Right: Securities Act Section 12(2) Applies Only to Public Offerings*, 48 Bus. Law 1, 6-7 (1992) (hereinafter Weiss). As the Third Circuit explained in *Ballay v. Legg Mason Wood Walker, Inc.*, the term "prospectus" is used in the 1933 Act generally (and section 12(2) specifically) as a "term of art which describes the transmittal of information concerning the sale of a security in an initial distribution." 925 F.2d at 688. *See also First Union Discount Brokerage Services, Inc. v. Milos*, 997 F.2d 835, 843 (11th Cir. 1993); Robert A. Prentice *Section 12 (2): A Remedy for Wrongs in the Secondary Market?*, 55 Alb. L. Rev. 97, 125 (1990) (hereinafter Prentice). That court was correct that the term "prospectus" is consistently used in the statute to refer to initial distributions.[9] There is no warrant in the statute or

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[9] Although section 2(10), 15 U.S.C. § 77b(10), broadly defines "prospectus" in the context of initial offerings, there is no

legislative history for extending it beyond the offer of a public sale of securities.[10]

The term "oral communication" in section 12(2) must also refer to public offerings. It would be an absurd result to read the term more broadly than the term "prospectus". The phrase is properly limited by the canon of construction *noscitur a sociis* to oral communications made in connection with a public distribution. *Ballay*, 925 F.2d at 688. And again, to read the phrase "by means of a prospectus or oral communication . . ." to refer to all sales, rather than just public offerings, would be to strip it of any meaning. If Congress had intended to create a remedy that applied to all securities sales, it could simply have left out this crucial phrase. Weiss at 6-7.

Should there be any lingering ambiguity about the meaning of the term prospectus, the 1933 Act's legislative history repeatedly emphasizes that Congress was regulating public offerings, not privately negotiated sales, when it drafted section 12(2). While the Court has noted that

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justification for applying it to the entire universe of sales. The legislative history and structure of the 1933 Act reinforce that that definition should be limited to public offerings. In particular, the incorporation into this definition of the standards in sections 10 and 5, which deal exclusively with registration requirements in public offerings, clearly place it outside the realm of a private sale, which has no requirement of registration at all. In addition, section 2's "context" clause provides a statutory basis for limiting the term "prospectus" in section 12(2). *See* Weiss at 14-16.

[10] This reading of section 12(2) is supported by its location within the structure of the 1933 Act . It is a part of section 12, and directly follows section 11; both section 12(1) and 11 deal with violations of the registration requirements, which only apply to initial distributions. *See Ballay*, 925 F.2d at 691.

specific legislative history regarding section 12(2) is "sparse" *Randall v. Loftsgaarden*, 478 U.S. 647, 657 (1986), there is abundant legislative history demonstrating that the Act, as a whole, was designed to regulate only public offerings. *See* H.R. Rep. No. 85, at 5, 7, 9, 13-14. Indeed, James Landis, a principal drafter of the 1933 Act, has explained that the "patent concern" of the Bill's authors was "the flow of securities from the issuer through underwriters to the public rather than with the subsequent buying and selling of these securities by the public." James L. Landis, *The Legislative History of the Securities Act of 1933*, 28 Geo. Wash. L. Rev. 29, 36 (1959).[11]

This intent to reach only public offerings in the 1933 Act is so clear that Congress would have had to make any departure explicit. *See, e.g.*, Weiss at 18; Prentice at 123. Thus, the fact that the House Report does not expressly limit section 12(2) is "not neutral." Weiss at 18. Given the clear focus of the 1933 Act, there was no reason for the House Committee to discuss whether or not each particular provision was also aimed at regulating public offerings. *Id.*

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[11] One statement in the House Report concerning the scope of the 1933, for example, reads:

> In view of these exemptions [for certain securities and transactions] *and the restriction of the bill's application to new offerings*, the bill does not affect transactions beyond the need of public protection in order to prevent recurrences of demonstrated abuses.

H.R. Rep. No. 85, at 7 (emphasis added). President Roosevelt, in his message to Congress, described the concern of the proposed legislation culminating in the 1933 Act as "newly issued securities" and "every issue of new securities." "Regulation of Securities Issues," *Message from the President of the United States*, H.R. Doc. No. 12, 73d Cong., 1st Sess. 1 (1933).

Act, the House Report states: the "essential characteristic" of these civil liabilities "consists of the fact that all those responsible for statements upon the face of which the *public is solicited* . . . shall be held to standards like those imposed by law upon a fiduciary." H.R. Rep. No. 85, at 5 (emphasis added). Congress expressed no such intent for private business dealings.

The state court created a further anomaly. It generally agreed with the Third Circuit's holding in *Ballay* that section 12(2) does not apply to secondary transactions. Pet. App. A25-27. Nevertheless, relying entirely on two passages in the legislative history of the 1933 Act, the lower court held that the statute extends to after-market security sales that have "the characteristics of initial offerings due to the seller's control and access to information." Pet. App. A25-26 *citing* H.R. Rep. No. 85, at 5, 13-14. The court thus equated a sale of one hundred percent of the stock of a company with an "initial" offering, essentially because a seller possesses more information about the company than the buyer does. This analysis cannot stand.

First, the court's analysis simply ignores the nature of a privately negotiated sale where, as here, the full books and records of the company are opened to the potential buyer, who is in a position to demand any information it wishes. In such a setting, there is no information imbalance of power of the sort that Congress was concerned with in regulating initial offerings. If a buyer in the private setting

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Purchase Agreement at § 9.5(c). To extend section 12(2) to such a buyer in a privately negotiated transaction would constitute an extraordinary intrusion by the federal government into private business dealings and an entirely new fiduciary standard for all private sellers of businesses.

is in fact defrauded, it has the full remedies of the 1934 Act, as well as other fraud remedies.

Second, in reaching its peculiar result, the Texas court completely misread the two passages of legislative history upon which it relied. That history requires that for any "redistribution" of stock to be covered by section 12(2), the sale must include a public offering, the focus of the Act.[13] Beginning the general analysis of the Act's scope, the House Report notes that the Act does not affect "the ordinary redistribution of securities unless such redistribution takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering." H.R. Rep. No. 85 at 5. "Distribution" is a term which is broadly understood to be a public sale of stock. *See e.g. Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 466 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959); *Cheltenham Bank v. Drexel Burnham Lambert, Inc.*, 1989 Fed. Sec. L. Rep. (CCH) ¶ 94,391 (E.D.N.C. 1989).

The House Report makes clear that the "redistribution" referred to is also a public sale. The Report elaborated that where one or a small group of individuals own all stock in a company:

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[13] Although not cited by the Texas court, a minority of district courts, relying on the same legislative history passages as the Texas court, have also discussed a limited exception to the *Ballay* rule for secondary market transactions which take on the characteristics of new offerings. *See, e.g., Hedden v. Marinelli*, 796 F. Supp. 432, 435 (N.D. Cal. 1992); *Budget Rent A Car Sys., Inc. v. Hirsch*, 810 F. Supp. 1253, 1257-8 (S.D. Fla. 1992); *Fujisawa Pharmaceutical Co. v. Kapoor*, 814 F. Supp. 720, 729-30 (N.D. Ill. 1993). Like the lower court here, however, these cases also rely solely on the language of the House Report which makes clear that a public offering is required for a redistribution of stock to be covered by section 12(2).

> they may wish to dispose of their holdings and *to make an offer of this stock to the public*. Such a *public offering* may possess all the dangers attendant upon a new offering of securities. Whenever such a *redistribution* reaches significant proportions, the distributor would be in the position of controlling the issuer and thus able to furnish the information demanded by the bill. This being so, the distributor is treated as equivalent to the original issuer and, *if he seeks to dispose of the issue through a public offering*, he becomes subject to the act.

H.R. Rep. No. 85 at 13-14 (emphasis added), *cited* at Pet. App. A26.[14] The Report uses the terms "public offering" and "redistribution" interchangeably.

The parties expressly agreed that this sale was not a "distribution." Summit represented and warranted that it was acquiring the stock of Herby's solely for investment purposes and not for the purpose of distribution. Stock Purchase Agreement at § 9.5. In fact, Summit acknowledged that the stock it was purchasing would become restricted stock so as to preclude its public resale. *Id*.

It could not be clearer that for an aftermarket transaction to be covered, a public offering is required; the lower court simply ignored that fact. As recognized by one of the few courts even to discuss a potential exception to

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[14] The "redistribution" referred to in the House Report is thus explicitly aimed at the "underwriter" situation, in which all of the stock of a company is bought and then "redistributed" in a public offering. This has no application where the buyer purchases the stock for investment, not for distribution, as indisputably occurred here. *See* Stock Purchase Agreement at §9.5.

Ballay for redistributions which take on the characteristics of initial offerings, "[w]ithout a public offering, a transaction cannot qualify as an exception to the initial offering rule." *Hirsch*, 810 F. Supp. at 1257-58.

2. Intertwined with its basic error in applying the 1933 Securities Act to a private sale of stock, the lower court misinterpreted the Act in two other important respects.[15] First, the Texas court of appeals contravened well-settled law when it held that "restoration of the status quo ante is not a binding prerequisite to the remedy of rescission" under section 12(2). Pet. App. A22. A return of both parties to the *status quo* is a requirement for the remedy of rescission. 1 George E. Palmer, *Law of Restitution* § 3.11 at 294 (Little, Brown & Co. 1978); *Restatement (Second) of Contracts* § 384 (1) (1981)("a party will not be granted restitution unless . . . he returns or offers to return, conditional on restitution, any interest in property that he has received in exchange in substantially as good condition as when it was received by him . . . ").

Courts have not hesitated to apply this traditional requirement to the rescissory remedy of section 12(2). *See Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1035 (2d Cir. 1979) (rescission under section 12(2) means "an exchange meant to put the parties in a *status quo*."); *Johns Hopkins Univ. v. Hutton*, 297 F. Supp. 1165, 1226 (D. Md. 1968), (a security may be so changed that it would cause "rescission under section 12(2) to be unavailable"), *aff'd in part and rev'd in part on other grounds*, 422 F.2d 124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974), *Bridgen v. Scott*, 456 F. Supp. 1048, 1059 (S.D. Tex. 1978); *Gannett Co. v. Register Publishing Co.*, 428 F. Supp. 818, 827 (D. Conn. 1977)(the standards for determining whether an injured party is entitled to rescission under

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[15] Neither error would require correcting if the petitioners in *Gustafson* prevail.

section 12(2) "are essentially the same as the standards developed in common law fraud cases."). Indeed, nowhere in the text of the 1933 Act or its legislative history is there any indication that Congress intended to do away with the traditional rescissory requirement that both parties be returned to the *status quo*.

We do not quarrel with the proposition that a decline in the market value of a stock will not necessarily defeat rescission. *See Randall v. Loftsgaarden*, 478 U.S. at, 659.[16] Market decline on a passive investment, however, is not what happened here. Once Herby's was sold, Summit actively and unalterably transfigured and changed the company. Now there is nothing left of Herby's, and Summit cannot return the asset, or even any part of the asset it purchased. All that is left is worthless paper stock.[17]

The jury recognized this unarguable truth when it found that Summit could not return the *status quo* and

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[16] In reaching its conclusion that rescission was appropriate here, where Summit could not return the *status quo*, the Texas court of appeals erroneously applied *Randall v. Loftsgaarden*. The Court, in *Loftsgaarden*, was not presented with nor did it decide the question of whether both parties must be restored to the *status quo* in order for rescission to be appropriate. Instead, *Loftsgaarden* turned on the issue of whether tax benefits would be deemed "income" under the plain language of section 12(2). The Court held that they could not, explaining that "at common law, it is quite likely that tax benefits would be ignored for purposes of a rescissory remedy." *Id.* at 658. The same common law principles of rescission that the Court looked to in *Loftsgaarden* should also be applied in this case.

[17] Although to be entitled to rescission under section 12(2), the buyer must possess and have ability to tender the return of the securities, that is not the sole condition for rescission. Ability to tender the stock is merely a threshold requirement.

suffered $0.00 damages as a result of any misrepresentations. Nevertheless, Buyer here stands to collect a windfall of $5.5 million dollars, a full rescissory return of the purchase price of Herby's. Thus, applying section 12(2) to the instant transaction would do no more than provide Summit with an unjustified safety net of rescission now that it has become dissatisfied with its deal. This strange result is simply not what Congress had in mind when it enacted section 12(2).

The Texas Court of Appeals apparently believed that it was compelled to order rescission, notwithstanding the windfall that Buyer would receive, because otherwise the "sole remedy [under section 12(2)] would be unavailable." Pet. App. A23. While the court of appeals is correct that rescission is the only remedy provided under section 12(2), its concern for a wronged plaintiff is misplaced. Summit had, and actually pleaded, several theories of recovery, including statutory and common law fraud. Summit is also pursuing a potential federal remedy under section 10(b) of the 1934 Act. All of these causes of action would provide relief for actual damages suffered, and represent the appropriate avenues for relief in the aftermarket. Actual damages should be the measure in a case like this where the purchaser received a valuable company, but cannot return the company to the seller.

3. Finally, the Texas Court of Appeals created a new burden for establishing validity of a release under federal law. Specifically, it held that the mutual release here, for which Seller paid valuable consideration, did not apply to the securities claims, even though Buyer intended to release them. The court concluded that the anti-waiver provisions of the securities laws precluded release of not only future claims, but even those fully matured existing claims, if they were unknown to Buyer at the time of the release. Pet. App. A10-A14. The law is clear, however, that

the release is effective as to securities claims that existed at the time, whether or not Summit had actual knowledge of them. What the anti-waiver provisions prohibit is an agreement to waive or excuse **future** violations, which this release did not do. *Weinraub v. International Banknote Co.*, 422 F. Supp. 856 (S.D.N.Y. 1976).

The Ninth Circuit has held that where, as here, a release is the result of settlement negotiations between parties of equal bargaining power represented by counsel, it is indeed effective even as to **unknown** existing securities claims. *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337, 1341-43 (9th Cir. 1992). The Ninth Circuit distinguished a unilateral relinquishment or waiver of rights, against which the anti-waiver provisions were meant to protect, from a release of all existing claims in exchange for valuable consideration, which evidences the parties' intent to end all of their various disputes and buy future peace.

The lower court failed to appreciate (Pet. App. A11) that the standard established by the Seventh Circuit also supports Seller's analysis. *See Goodman v. Epstein*. 582 F.2d 388 (7th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979). The Seventh Circuit emphasized that the mere fact that one is faced with releasing another party from any possible liability "in connection with a transaction in securities," puts that individual on notice that he should undertake a "reasonable inquiry" to discover possible matured claims existing at the time of the release. 582 F.2d at, 404. That duty to inquire "insures that the signing of a waiver is something that will not be undertaken lightly," in the expectation that the anti-waiver provisions will justify acting with one's eyes closed. *Id.* at 404.

Because Buyer controlled and operated Herby's for three months before signing the release, it unquestionably had the means to know all of its claims before releasing them. Regardless of whether Summit had actually

discovered the securities claims before signing the release, in the words of *Goodman*, it certainly "**could** have" done so upon reasonable inquiry." 582 F.2d at 403 (emphasis added). The law is thus clear that Buyer's release of its other claims, was completely effective.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 1994

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APPENDIX A

THE SUPREME COURT OF TEXAS

P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 2, 1994

[LISTING OF COUNSEL OMITTED]

RE: Case No. D-4121
Style: ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC. v. SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY

Dear Counsel:

Today, the Supreme Court of Texas overruled both motions for rehearing in the above referenced application/s for writ of error. Justice Enoch not sitting.

Sincerely,

John T. Adams, Clerk

by /S/
Blanca Morin, Deputy

THE SUPREME COURT OF TEXAS

P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

March 30, 1994

[LISTING OF COUNSEL OMITTED]

RE: Case No. D-4121
Style: ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC. v. SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY

Dear Counsel:

Both applications for writ of error in the above referenced case were this day denied with the notation, Writ Denied. Motion for extension to file brief is granted. Justice Enoch not sitting.

Sincerely,

John T. Adams, Clerk

by /S/
Blanca Morin, Deputy

APPENDIX B

AFFIRMED in part, REVERSED in part, MODIFIED, RENDERED in part, and REMANDED. Opinions filed June 9, 1993.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-92-00389-CV

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC., Appellants

v.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY, Appellees

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On Appeal from the 160th District Court
Dallas County, Texas
Trial Court Cause No. 88-13482-H

OPINION

Before Justices Baker, Chapman, and Barber
Opinion By Justice Barber

This case involves disputes arising out of Campbell Taggart, Inc.'s sale of the stock of Herby's Foods, Inc. to Summit Coffee Company. Campbell Taggart and its parent, Anheuser-Busch Companies, Inc., sued Summit and its parent, The Dunnam-Snyder Company. Campbell Taggart and Anheuser-Busch sought damages for breach of obligations under a covenant not to compete and for monies expended by Anheuser-Busch to process and pay insurance claims against Herby's. Summit and Dunnam-Snyder asserted various counterclaims, including federal and state securities law violations, statutory and common law fraud, and negligent misrepresentation. The trial court rendered judgment in favor of Summit and Dunnam-Snyder, and Campbell Taggart and Anheuser-Busch appeal, asserting eighteen points of error. Summit and Dunnam-Snyder assert three cross-points of error. We reverse in part, affirm in part, render in part, modify, and remand for further proceedings.

SUMMARY OF FACTS

A. The Agreements

On October 26, 1987, Summit and Campbell Taggart entered into a stock purchase agreement by which Summit bought Herby's from Campbell Taggart for $5,500,000. The agreement provided for a purchase price adjustment three months after the sale, and it contemplated that the parties

would execute mutual releases in connection with the adjustment of the price on the adjustment closing date. If the parties could not agree on the adjusted price, they had the right to pursue their full legal remedies. The parties were to have full access to the books and records of Herby's prior to the adjustment. The agreement provided for either reductions or increases of the initial purchase price. The final adjusted purchase price was to be reduced by the amount of any undisclosed liabilities of Herby's, except that the purchase price would be reduced by truck lease liabilities only to the extent that those liabilities exceeded $600,000.

Also on October 26, 1987, Summit, Campbell Taggart, and Anheuser-Busch entered into a covenant not to compete. Campbell Taggart and Anheuser-Busch agreed not to compete against Herby's, and Summit agreed to cause Herby's to pay $500,000 to Campbell Taggart and Anheuser-Busch, payable in five annual installments of $100,000 each. The stock purchase agreement provided that Summit should cause Dunnam-Snyder to guarantee all of the obligations of Herby's and Summit contained in both the agreement not to compete and the purchase agreement.

Because of the large deductibles applicable to some insurance claims outstanding against Herby's, Summit and Dunnam-Snyder expressed some concern about the potential uninsured exposure. As a result of these reservations, the parties entered into a side letter agreement capping Summit's liability for each insurance claim at $100,000. Campbell Taggart agreed to pay all amounts in excess of $100,000 per claim. To handle post-closing processing of the insurance claims, the parties entered into a reimbursement agreement. The agreement provided that Anheuser-Busch would continue to advance the processing costs and that Summit and Dunnam-Snyder would

reimburse Anheuser-Busch for those expenses up to the agreed-upon $100,000 cap.

As the date for the final purchase price adjustment approached, the parties had disagreements about the amount of the price adjustment and representations concerning Herby's inventory. On February 1, 1988, Campbell Taggart, Summit, and Dunnam-Snyder entered into a compromise settlement agreement and mutual release regarding their disputes. Under the agreement, Campbell Taggart paid $435,135.03 to Summit and Dunnam-Snyder. All parties agreed to release each other "from any and all causes of action of any nature whatsoever, at common law, statutory or otherwise, . . . known or unknown," directly or indirectly attributable to the "above-recited disputes or controversies" and all past, present, and future obligations of Campbell Taggart in connection with sections 2, 3, and 8.4(c) of the stock purchase agreement.[1]

B. The Litigation

In 1988, Campbell Taggart and Anheuser-Busch sued Summit and Dunnam-Snyder to recover the remaining payments due under the covenant not to compete. Only the first installment of $100,000 had been paid. They also sought the expenses that Anheuser-Busch had paid for processing insurance claims to the extent that they were within the

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[1] Section 2, entitled "Adjustments of the Purchase Price," detailed the methods and the reasons for any reductions or increases of the initial purchase price of Herby's, including reductions for undisclosed liabilities. Section 3, entitled "Adjustment Period," specified that information would be provided by the seller to the buyer and that both parties would have access to Herby's books and records prior to the final adjustment. Section 8.4(c), which is not at issue in this case, contained representation by the seller about Herby's inventory.

$100,000 per claim cap.[2] Those expenses were stipulated to be $486,472.85.

Summit and Dunnam-Snyder counterclaimed, alleging that Campbell Taggart and Anheuser-Busch had misrepresented the extent of Herby's liabilities by failing to disclose some outstanding insurance claims and the terms of a Ryder truck lease. Summit and Dunnam-Snyder asserted claims of state and federal securities law violations, statutory and common law fraud, and negligent misrepresentation. It is undisputed that Campbell Taggart and Anheuser-Busch failed to disclose twenty-one insurance claims. There was conflicting evidence about the disclosures regarding the truck lease.

The jury made findings indicating that Campbell Taggart and Anheuser-Busch had violated state and federal securities law and had made material misrepresentations about Herby's liabilities. The jury found that Summit and Dunnam-Snyder had agreed to reimburse Anheuser-Busch for the insurance claim processing costs and had been unjustly enriched because of their failure to reimburse. However, the jury also found estoppel because Campbell Taggart and Anheuser-Busch had made material misrepresentations. The jury further found that Summit could not restore the status quo and that it suffered no damages as a result of the misrepresentations. The jury awarded actual and punitive damages to Dunnam-Snyder for negligent misrepresentation.

The trial court awarded rescission of the purchase price to Summit under the securities laws. The court also

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[2] As noted below, this lawsuit involves some undisclosed insurance claims against Herby's. However, Anheuser-Busch sought reimbursement expenses for only those claims that had been disclosed to Summit and Dunnam-Snyder.

awarded to Dunnam-Snyder actual and punitive damages for negligent misrepresentation as found by the jury. Summit was awarded attorney fees, and both Summit and Dunnam-Snyder were awarded pre- and postjudgment interest. The court denied any relief to Campbell Taggart and Anheuser-Busch.

RELEASE AGREEMENT

In their first point of error, Campbell Taggart and Anheuser-Busch contend that the trial court erred as a matter of law in rendering judgment for Summit and Dunnam-Snyder because their claims are barred by the release agreement. They argue that the release covers undisclosed liabilities like the ones at issue in this case. Summit and Dunnam-Snyder claim that the release is narrow and does not encompass the claims at issue. They also argue that the release is invalid under state and federal securities laws and that the defense of release was waived by failure to obtain jury findings on the issue.

A. Scope of Release

1. Applicable Law

A release that is valid on its face and has not been set aside is a complete bar to any later action based on matters covered by the release. *Deer Creek Ltd. v. North Am. Mortgage Co.*, 792 S.W.2d 198, 201 (Tex. App.--Dallas 1990, no writ); *DeLuca v. Munzel*, 3 S.W.2d 373, 375 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see Hart v. Traders & Gen. Ins. Co.*, 144 Tex. 146, 149, 189 S.W.2d 493, 494 (1945). In construing a release, as with other contracts, the primary effort is to ascertain and give effect to the intention of the parties to the release, considering the instrument as a whole.

Crawford v. Kelly Field Nat'l Bank, 733 S.W.2d 624, 627 (Tex. App.-- San Antonio 1987, no writ); *Johnson v. J.M. Huber Corp.*, 699 S.W.2d 879, 882 (Tex. App.--Amarillo 1985, writ ref'd n.r.e.); *Texas City Ref., Inc. v. Universal Oil Prods. Co.*, 681 S.W.2d 303, 305 (Tex. App.--Houston [14th Dist.] 1984, no writ); *Berry v. Guyer*, 482 S.W.2d 719, 720 (Tex. Civ. App.--Houston [14th Dist.] 1972, writ ref'd n.r.e.); *Mutual Fire & Auto Ins. Co. v. Green*, 235 S.W.2d 739, 742 (Tex. Civ. App.--Fort Worth 1950, no writ). When a release refers to a related document, the other document should be taken into consideration. *See Green*, 235 S.W.2d at 742.

General categorical release clauses must be narrowly construed. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 422 (Tex. 1984). Generally, a release covers only existing claims or claims being urged when the release was delivered. *Berry*, 482 S.W.2d at 720. A valid release may encompass unknown damages, results, or claims that may develop in the future. *Williams v. Glash*, 789 S.W.2d 261, 264-65 (Tex. 1990); *Quebe v. Gulf, C. & S. F. Ry.*, 98 Tex. 6, 13-14, 81 S.W. 20, 21-22 (1904); *Texas City Ref.*, 681 S.W.2d at 305; *White v. Grinfas*, 809 F.2d 1157, 1160 (5th Cir. 1987) (applying Texas law). Any claims not clearly within the subject matter of the release are not discharged, even if they existed when the release was executed. *Brady*, 811 S.W.2d at 938; *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199, 204 (Tex. App.--San Antonio 1986, writ ref'd n.r.e.). The release must "mention" the claim to be released. *Brady*, 811 S.W.2d at 938.

2. Application of Law

We determine, based on the language of the release, that the parties intended the release to encompass the claims raised by Summit and Dunnam-Snyder. The release states that the parties had disagreements about the final adjusted

purchase price of Herby's, referring specifically to sections 2 and 3 of the stock purchase agreement. Section 2 provides that the adjusted purchase price shall be reduced to the extent of undisclosed liabilities. Section 2 even makes specific reference to liabilities regarding truck leases. Undisclosed liabilities, including undisclosed liabilities involving the terms of the Ryder truck lease, are at the heart of this lawsuit.

Thus, the purchase agreement contemplated the existence of undisclosed liabilities and provided for a purchase price reduction to the extent of such undisclosed liabilities. The release, in turn, specifically refers in the initial recitals to these sections of the purchase agreement and the disagreements regarding the adjusted purchase price. For the substantial consideration of over $435,000, and "in consideration of the [r]ecitals set forth above," Summit and Dunnam-Snyder released "any and all causes of action of any nature whatsoever, at common law, statutory or otherwise," which they "have or might have, known or unknown, now existing or that might hereafter directly or indirectly be attributable to . . . the above-recited disputes and controversies."

Although the release contains some broad language, when read as a whole it is specific about its scope. Even if we were to determine that the release contains some "general, categorical release clauses," by reading the release as a whole and using the language of the recitals to restrict the broader language which follows, we give the mandated narrow construction to such clauses. Having done so, we determine that the claims asserted by Summit and Dunnam-Snyder in this lawsuit, all of which involve undisclosed Herby's liabilities, are within the scope of the release. That the release does not specifically mention fraud or securities law claims is irrelevant. The release, by reference to the

stock purchase agreement, mentions *all* claims involving undisclosed liabilities, a specific class of claims that includes the claims at issue. Although perhaps unknown to Summit and Dunnam-Snyder when the release was executed, the record demonstrates that the claims, if valid, existed at that time. When parties specifically agree that they intend to release both "known and unknown" claims, we are required to honor and give effect to their agreement.

B. Validity of Release Under Securities Laws

1. Applicable Law

Both the federal and state securities statutes contain anti-waiver provisions. *See* 15 U.S.C.A. § 77n (West 1981); TEX. REV. CIV. STAT. ANN. art. 581-33(L) (Vernon Supp. 1993). The Texas provision is "essentially the same" as the federal provision. TEX. REV. CIV. STAT. ANN. art. 581-33 cmt. (Vernon Supp. 1993). The comment following the Texas statute states that the anti-waiver provision does not apply to, and therefore does not diminish the effectiveness of, a bona fide release or settlement of an existing claim, whether or not a suit has been filed. *Id.*

Despite the federal anti-waiver provisions, settlements or releases of claims involving violations of federal securities laws are not void as a matter of law, but the right to sue granted by those laws should be preserved against unintentional or involuntary waiver. *Murtagh v. University Computing Co.*, 490 F.2d 810, 816 (5th Cir.), *cert. denied*, 419 U.S. 835 (1974). A release of federal securities law claims is valid only as to mature, ripened claims of which the releasing party has actual knowledge or which the party could have discovered upon reasonably inquiry. *Goodman v. Epstein*, 582 F.2d 388, 402-04 (7th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Doody v. E.F. Hutton & Co.*, 587 F. Supp. 829,

832 (D. Minn. 1984); *see American Gen. Ins. Co. v. Equitable Gen. Corp.*, 493 F. Supp. 721, 750-51 (E.D. Va. 1980). A release negotiated at arm's length and not the product of duress, fraud, or mutual mistake, which relates to matured claims of past federal securities law violations and does not excuse future violations, is valid and should be given its full legal effect. *Weinraub v. International Banknote Co.*, 422 F. Supp. 856, 858 (S.D.N.Y. 1976).

2. Application of Law

The federal cases applying the federal anti-waiver provision, particularly the *Goodman v. Epstein* opinion, are well reasoned and persuasive. Because the Texas provision is essentially the same as the comparable federal provision, we adopt and follow the reasoning and holdings in the above-cited federal cases in applying the Texas anti-waiver provision.

The record shows that the claims asserted by Summit and Dunnam-Snyder were mature and in existence at the time the parties executed the release. The next question is whether Summit or Dunnam-Snyder had actual knowledge at that time of the existence of the claims or whether the claims were subject to discovery upon reasonable inquiry. Despite some compelling evidence that Summit and Dunnam-Snyder either knew or should have known of the facts underlying their claims when they executed the release, the jury found that they did not have either actual or constructive knowledge until August 12, 1988, more than six months *after* the release was executed.

Campbell Taggart and Anheuser-Busch have not asserted on appeal that the jury finding is in any way erroneous. Therefore, the finding is binding on the parties and this Court and must be treated as conclusively

established. *See Crain v. Hill County*, 613 S.W.2d 367, 369 (Tex. Civ. App.--Waco 1981, writ ref'd n.r.e.); *Harvey v. Denton*, 601 S.W.2d 121, 125 (Tex. Civ. App.--Eastland 1980, writ ref'd n.r.e.); *Dallas Transit Co. v. Young*, 370 S.W.2d 6, 10 (Tex. Civ. App.--Dallas 1963, writ ref'd n.r.e.). Accordingly, because Campbell Taggart and Anheuser-Busch do not challenge the finding that Summit and Dunnam-Snyder had neither actual nor constructive knowledge of the facts giving rise to their securities law claims at the time the release was executed, the release is not effective to bar those claims.

C. Waiver of Release Defense

A question remains about whether the release is effective to bar Summit and Dunnam-Snyder's other claims, there being no statutory bar to its effectiveness regarding those other claims. Summit and Dunnam-Snyder contend that Campbell Taggart and Anheuser-Busch waived their defense based on the release because they failed to obtain any jury findings on the issue. We disagree.

1. Applicable Law

The trial court shall submit to the jury controlling questions raised by the pleadings and the evidence. TEX. R. CIV. P. 278; *see Martin v. United States Trust Co.*, 690 S.W.2d 300, 310 (Tex. App.--Dallas 1985, writ ref'd n.r.e.). On the other hand, when facts are undisputed or conclusively established, there is no need to submit the issue to the jury. *Sullivan v. Barnett*, 471 S.W.2d 39, 44 (Tex. 1971); *Martin*, 690 S.W.2d at 310. It is elementary that legal questions should not be submitted to the jury. *C & C Partners v. Sun Exploration & Prod. Co.*, 783 S.W.2d 707, 715 (Tex. App.--Dallas 1989, writ denied).

Construction of an unambiguous contract is a legal issue to be decided by the court. The jury resolves only *factual* disputes about the conduct of the contracting parties if such disputes remain after the trial court has determined the parties' respective obligations under the contract. *See ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248, 253 n.3 (Tex. App.--Dallas 1990, no writ); *see also S & D Group, Inc. v. Talamas*, 710 S.W.2d 680, 683 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.) (construction of unambiguous contract is question of law; jury may not be asked to construe legal effect of contract).

The question of whether a contract is ambiguous is a question of law. If a contract is so worded that a court may properly give it a certain or definite legal meaning, it is not ambiguous. A contract is ambiguous only when the application of pertinent rules of interpretation result in genuine uncertainty about which one of two or more meanings is the proper meaning. *C & C Partners*, 783 S.W.2d at 714.

2. Application of Law

No party pleaded that the release is ambiguous. The record indicates that all parties and the court treated construction of the release as a legal question. Our prior discussion of the scope of the release establishes that the release is unambiguous and that it encompasses the claims at issue in this case. Accordingly, there was nothing further to submit to the jury concerning the release, and Campbell Taggart and Anheuser-Busch did not waive their defenses based on the release.

Based on the foregoing, our holdings regarding the release are as follows. The release covers all of the claims asserted by Summit and Dunnam-Snyder. However,

because of the anti-waiver provisions in the state and federal securities laws, and because of the jury's uncontested finding that Summit and Dunnam-Snyder had neither actual nor constructive knowledge of the facts underlying their claims when the release was executed, the release does not bar the securities law claims. On the other hand, because there is no bar to the effectiveness of the release regarding the remainder of Summit and Dunnam-Snyder's claims, those claims are barred because they were contractually released. Accordingly, we sustain in part the first point of error.

MATERIALITY OF MISREPRESENTATIONS

In the second point of error, Campbell Taggart and Anheuser-Busch maintain that the evidence was either legally or factually insufficient to support the jury's findings that they made any statements or omissions that were material or misleading.

A. Standards of Review

In reviewing a no evidence point, we consider only the evidence and inferences that tend to support the challenged findings. All evidence and inferences to the contrary are disregarded. *Jacobs v. Danny Darby Real Estate, Inc.*, 750 S.W.2d 174, 175 (Tex. 1988). We uphold the jury's findings if there is more than a scintilla of probative evidence to support them. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 795 n.3 (Tex. 1991). Evidence that creates a mere surmise or suspicion of the existence of a fact is no more than a scintilla and has no legal effect. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

In reviewing a factual insufficiency point, we consider and weigh all of the evidence. The jury findings

must be upheld unless the evidence is so weak or the findings are so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. *Levinge Corp. v. Ledezma*, 752 S.W.2d 641,643 (Tex. App.-- Houston [1st Dist.] 1988, no writ). The jury weighs the evidence and determines the credibility of the witnesses. We do not substitute our judgment for that of the jury, even if a different answer could have been reached on the evidence. *Clancy v. Zale Corp.*, 705 S.W.2d 820, 826 (Tex. App.-- Dallas 1986, writ ref'd n.r.e.).

B. Applicable Law

An omission or misrepresentation is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding to invest. Stated another way, there must be a substantial likelihood that proper disclosure would have been viewed by the reasonable investor as significantly altering the total mix of information made available. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); Bridwell v. State, 804 S.W.2d 900, 903-04 (Tex. Crim. App. 1991). An investor is not required to prove that he would have acted differently but for the omission or misrepresentation. *TSC Indus.*, 426 U.S. at 449.

C. Sufficiency Review

1. Legal Sufficiency

One of the alleged misrepresentations was Campbell Taggart's representation that the Herby's Ryder truck lease had a fixed *monthly* charge of $87.13 per truck. However, the actual charge was $87.13 *weekly*. It is obvious that this misrepresentation substantially understated the cost of the truck lease. There was evidence that Summit and Dunnam-

Snyder made profit projections regarding Herby's using the erroneous figures supplied by Campbell Taggart and that the actual expenses wiped out the projected profits for the first two years after acquisition.

It was undisputed that Campbell Taggart failed to disclose twenty-one insurance claims outstanding against Herby's. The importance of pending insurance claims is demonstrated by the fact that Summit and Dunnam-Snyder raised concerns about potential exposure due to *disclosed* claims and their associated high deductibles. This concern led to a side agreement at closing which capped Summit's liability on the disclosed claims. The amount ultimately paid on the undisclosed claims approached $600,000.[3] William Snyder, president and director of Summit, testified that Summit would not have purchased Herby's if full disclosure about the truck lease and the insurance claims had been made.

There was ample evidence that the omissions and misrepresentations were material in the sense that the correct information would have been important to a reasonable investor and buyer. The no evidence contention has no merit.

2. Factual Sufficiency

Campbell Taggart and Anheuser-Busch argue that the evidence of material misrepresentations was insufficient because the parties contemplated in their purchase agreement the possibility of undisclosed Herby's liabilities, and they provided for that contingency. The purchase

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[3] Campbell Taggart and Anheuser-Busch eventually paid all of the undisclosed claims. However, we view this fact as irrelevant to whether their failure to disclose was material.

agreement provided that Campbell Taggart would indemnify Summit for any losses over $200,000 suffered because of any inaccurate representations. According to Campbell Taggart and Anheuser-Busch, Summit and Dunnam-Snyder cannot claim to have been materially misled because they received a limitation on their losses and they acknowledged that the failure of Herby's had nothing to do with the misrepresentations.

This argument misses the point, which is whether there is a substantial likelihood that the omissions and misrepresentations would have been important to the decision-making process of a reasonable investor and buyer. The jury was presented with substantial evidence that the undisclosed and incorrect information was indeed important to the buying decision. Furthermore, the jury might well have determined that the $200,000 for which there was no indemnification could have been an important factor in the buying decision. Nothing in the purchase agreement states that the indemnity was to be the sole remedy. Although they did not have to prove it to establish materiality, Summit and Dunnam-Snyder provided evidence that Herby's would not have been purchased had full and correct disclosure been made. Thus, even if the misrepresented facts had nothing to do with why Herby's ultimately failed, the fact remains that *no* losses would have been suffered if Summit had not bought Herby's.

The evidence was factually sufficient to support the jury's findings that there were material omissions and misrepresentations. We overrule the second point of error.

ADMISSION OF DEPOSITION TESTIMONY

In their third point of error, Campbell Taggart and Anheuser-Busch contend that the trial court erred in

admitting the deposition testimony of a witness, George Willis, because he was not identified in discovery responses as a person with knowledge of relevant facts.

A. Pertinent Facts

The record shows that George Willis worked for Chuckwagon Foods, a company owned by Summit and Dunnam-Snyder. Upon Summit's acquisition of Herby's, Chuckwagon was to be merged with Herby's. After Summit bought Herby's, Willis became part of Herby's management. Prior to the acquisition of Herby's, Willis accompanied William Snyder and others on a trip for the purpose of visiting Herby's operations and talking to Herby's personnel.

At trial, Campbell Taggart and Anheuser-Busch called Tommy Jeffrey, a Herby's employee prior to the acquisition, as a witness. Jeffrey testified that he told Willis that the Ryder truck lease cost was about $87 per week. In response, Summit and Dunnam-Snyder called Willis as a witness by deposition. Willis denied that Jeffrey had told him about the truck lease charge, saying that he had no knowledge of the terms of the lease prior to the acquisition.

B. Applicable Law

A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter unless the trial court finds good cause for admission of the evidence. The party offering the evidence bears the burden of establishing good cause, and good cause must be shown in the record. TEX. R. CIV. P. 215(5).

Rule 215(5) is intended to require complete discovery responses in order to promote settlement and prevent trial by ambush. The sole sanction, exclusion of evidence, is automatic unless there is good cause to excuse its imposition. The good cause exception permits a trial court, exercising its discretion, to excuse a failure to comply in difficult or impossible circumstances. *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 914 (Tex. 1992) (op. on motion for reh'g). The erroneous admission of evidence when good cause is not shown is subject to a harmless error analysis. *See id.* at 917; *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989).

Error is reversible only when it amounts to such a denial of the appellant's rights as was reasonably calculated to cause and probably did cause rendition of an improper judgment. Tex. R. App. P. 81(b)(1). The determination of whether the error was harmful is made in light of the record as a whole. *McKinney v. National Union Fire Ins. Co.*, 772 S.W.2d 72, 75 (Tex. 1989) (op. on reh'g). Erroneous admission of evidence is harmless if the evidence is cumulative or not controlling on a material issue dispositive of the case. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 230 (Tex. 1990); *Gee*, 765 S.W.2d at 396. If the judgment is not controlled by the testimony that should have been excluded, there is no reversible error. *Mancorp*, 802 S.W.2d at 230. Ordinarily, improper admission of evidence does not constitute reversible error if other evidence supports the finding in question. *Gee*, 765 S.W.2d at 397.

C. Application of Law

When Campbell Taggart and Anheuser-Busch objected to testimony from Willis, the trial court heard

argument of counsel on the issue.[4] Although Summit and Dunnam-Snyder provided arguably good reasons why they did not consider Willis as a witness to be called at trial, those reasons do not really address the failure to list him as a person with knowledge of relevant facts. We will assume, without deciding, that the trial court erred in allowing Willis to testify.

The next question is whether the admission of Willis's testimony was harmful error. Campbell Taggart and Anheuser-Busch emphasize the fact that his testimony was the only testimony directly contradicting Jeffrey's testimony that Willis was told of the correct truck lease cost prior to the sale of Herby's. However, there was other evidence that Summit and Dunnam-Snyder were misinformed about the cost of the Ryder truck lease. The three people who were responsible for negotiating the purchase agreement for Summit and Dunnam-Snyder were all given incorrect information. At the pertinent time, Willis worked for Chuckwagon, and it was not clearly established that he was an agent of either Summit or Dunnam-Snyder. Thus, even if the jury had been convinced that Willis became aware of the correct truck lease charge, such knowledge might not have been attributable to Summit or Dunnam-Snyder or those who made the decision to purchase Herby's.[5]

There was also undisputed evidence of the failure to disclose twenty-one insurance claims pending against Herby's. Willis's testimony had nothing to do with these omissions. Snyder testified that Herby's would not have been bought had these claims been disclosed. Thus, the jury

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[4] In disposing of this point of error, we do not decide whether argument of counsel alone is sufficient to support an implied finding of good cause.

[5] The jury was instructed on corporate knowledge.

could have based its findings on the undisclosed insurance claims alone. Based on the record, even assuming it was error to allow Willis to testify, we hold that the admission of Willis's testimony was not harmful or reversible error. We overrule the third point of error.

AVAILABILITY OF RESCISSION

In the fourth point of error, Campbell Taggart and Anheuser-Busch contend that the trial court erred as a matter of law in disregarding the jury's finding that the parties could not be restored to the status quo ante and in awarding rescissionary damages to Summit.

A. Applicable Law

The federal statute states that the buyer "may sue either at law or in equity . . . to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." 15 U.S.C.A. § 77*l* (West 1981). Our state statute provides that the purchaser "may sue either at law or in equity for rescission, or for damages if the buyer no longer owns the security." TEX. REV. CIV. STAT. ANN. art. 581-33(A)(2) (Vernon Supp. 1993).

Regarding the federal securities law, rescission is generally an exchange meant to return the parties to a status quo, and can only take place if the purchaser returns the stock he received. The plaintiff is given no choice of remedy. If he owns the stock, he is entitled to rescission but not damages. If he no longer owns the stock, he is entitled to damages but not rescission. *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1035 (2d Cir. 1979). The statute prescribes the remedy of rescission except where the defrauded buyer no

longer owns the security, in which case he is entitled to a rescissory measure of damages. *Randall v. Loftsgaarden*, 478 U.S. 647, 655-56 (1986).

"[B]y enabling the victims of . . . fraud to demand rescission upon tender of the security, Congress shifted the risk of an intervening decline in the value of the security to defendants, whether or not that decline was actually caused by the fraud." *Id.* at 659. The plaintiff buyer is entitled to rescission whether or not the misrepresentations caused the bankruptcy of the business invested in. *Casella v. Webb*, 883 F.2d 805, 808-09 (9th Cir. 1989).

Because the state and federal statutes contain virtually the same wording, decisions of federal courts applying the federal law are reliable guides to application of the comparable state provisions. *First Mun. Leasing Corp. v. Blankenship, Potts, Aikrnan, Hagin & Stewart*, 648 S.W.2d 410, 414 (Tex. App.--Dallas 1983, writ ref'd n.r.e.). Texas courts look to federal court decisions because of the obvious similarities between the state and federal statutes. *Star Supply Co. v. Jones*, 665 S.W.2d 194, 196 (Tex. App.--San Antonio 1984, no writ).

B. Application of Law

Our reading of the controlling federal cases indicates that restoration of the status quo ante is not a binding prerequisite to the remedy of rescission. The United States Supreme Court has expressed the opinion that restoration of the status quo is only *one* goal sought to be served by the remedy of rescission. Moreover, the Court indicated that the concern is with restoration of the *plaintiff's* position, not necessarily the defendant's. *Randall v. Loftsgaarden*, 478 U.S. at 659. Thus, the federal statute shifts risk of any decline in the security's value to the defendant. Moreover, a federal

court has indicated that rescission is appropriate in a case, like this one, where the business invested in became bankrupt, a situation where the status quo ante obviously no longer prevails. *See Casella v. Webb*, 883 F.2d at 808-09.

Also, the federal courts have held that rescission is the exclusive remedy when the plaintiff still owns the stock. If an inability to restore the status quo barred rescission, the sole remedy would be unavailable. We do not believe that either Congress or the Texas Legislature intended such a result.

We determine that the Texas provision should be applied in accordance with the federal provision.[6] We hold that Summit, because it still owned the Herby's stock, was entitled to the remedy of rescission. We overrule the fourth point of error.

SECONDARY TRADING

In their fifth point of error, Campbell Taggart and Anheuser-Busch argue that the trial court erred as a matter of law in rendering judgment because the state and federal securities acts are inapplicable to a secondary trading transaction as in this case.

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6 We are aware that the Texarkana court of appeals recently held that defrauded buyers could recover damages even though they still owned the securities. *See Lutheran Bhd. v. Kidder Peabody & Co.*, 829 S.W.2d 300, 307 (Tex. App.--Texarkana), *judgment set aside and cause remanded for rendition of agreed judgment*, 840 S.W.2d 384 (Tex. 1992). We do not agree with this interpretation of the Texas statute. In any case, because damages are awarded using a rescissory measure, the distinction between the two remedies may be relatively unimportant.

A. Applicable Law

The federal district courts are split on this issue, and no federal court of appeals had directly addressed the issue as of 1990. *See Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 203 (3d Cir. 1990); *Mix v. E.F.Hutton & Co.*, 720 F. Supp. 8, 10-11 & n.3 (D.D.C. 1989). In 1991, the Third Circuit held that section 77*l* applied only to initial offerings of securities, not to after-market trading. *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682, 687-93 (3d Cir.), *cert. denied*, 112 S. Ct. 79 (1991).

In *Ballay*, the court first noted that the federal provision refers to misrepresentations in "a prospectus or oral communication." The court decided that the oral communication referred to must be one related to a prospectus or initial offering. The court also decided that Congress used the term "prospectus" as a term of art describing the transmittal of information concerning the sale of a security in an initial distribution. Thus, if "oral communication" was given an expansive reading, it would lead to the anomalous result that buyers could recover for negligent oral misrepresentations under section 77*l* but could only recover upon proof of scienter under section 78j(b) and SEC Rule 10b-5 if the misrepresentation was contained in a written prospectus. *Id.* at 688-89.

Secondly, the court determined that Congress generally intended to regulate initial offerings with the Securities Act of 1933, which contains section 77*l*. The Securities Exchange Act of 1934, on the other hand, was enacted to regulate securities exchanges and over-the-counter markets, where secondary trading takes place. The court relied on a House Report on the 1933 Act for the proposition that it regulates only initial offerings. *Id.* at 690.

Next, the court acknowledged that section 77q(a), although within the 1933 Act, applies to *all* trading. However, the court held that this fact did not lend support to the idea that section 77*l* also applies to all trading, basing this holding on differences of language in the two sections and the clear legislative history of section 77q(a). Finally, the court noted that, if secondary trading were actionable under section 77*l*, the use of section 78j(b) and rule 10b-5 would be eliminated because of section 77*l*'s more lenient proof requirements. *Id.* at 691-93.

Although the issue was not squarely presented, the United States Supreme Court has indicated that section 77*l* would apply to the secondary sale of all of the outstanding stock of a business. The question decided by the Court was whether the anti-fraud provisions of the 1933 and 1934 Acts apply to the sale of one hundred percent of the stock of a closely-held corporation. More specifically, the Court was addressing the argument that the stock of such a corporation is not a security covered by the Acts. *See* Landreth Timber Co .v andreth, 471 U.S. 681, 683-85 (1985). The Court held that such a transaction was subject to the Acts, specifically rejecting an argument that the Acts were intended to cover only passive investors and not privately negotiated transactions involving the transfer of control to entrepreneurs. *Id.* at 692, 697.

B. Application of Law

We find ourselves in agreement with most of what the Third Circuit court stated in *Ballay*. However, we do not believe that the court's holding was as broad as Campbell Taggart and Anheuser-Busch assert.

The *Ballay* court basically made distinctions between initial offerings of securities and secondary trading of those

securities on exchanges. When the court stated that section 77*l* applied only to initial offerings, it did so in the context of its discussion of such offerings as distinguished from secondary trading. The transaction at issue in this case is something of a hybrid, namely the sale by *one* owner of *all* of a company's stock.

As the *Ballay* court stated, the House Report on the 1933 Act noted that the statute affects only new offerings or *sales with the characteristics of new offerings*:

> The bill affects only new offerings of securities sold through the use of the mails or of instrumentalities of interstate or foreign transportation or communication. It does not affect the ordinary redistribution of securities *unless such redistribution takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering.*

H.R. Rep. No. 85, 73rd Cong., 1st Sess. 5 (1933) (emphasis added). Elsewhere, in a part not quoted by the *Ballay* court, the report states:

> All the outstanding stock of a particular corporation may be owned by one individual or a select group of individuals. At some future date they may wish to dispose of their holdings and to make an offer of this stock to the public. Such a public offering may possess all the dangers attendant upon a new offering of securities. *Wherever such a redistribution reaches significant proportions, the distributor would be in the position of controlling the issuer and thus able to furnish the information demanded by the bill. This being so, the distributor is treated as equivalent to the original*

> *issuer and, if he seeks to dispose of the issue through a public offering, he becomes subject to the act.* The concept of control herein involved is not a narrow one, depending upon a mathematical formula of 51 percent of voting power, but is broadly defined to permit the provisions of the act to become effective wherever the fact of control actually exists.

Id. at 13-14 (emphasis added).

Thus, the legislative history indicates that section 77*l* of the 1933 Act applies to initial offerings *and* to sales of securities that have the characteristics of initial offerings due to the seller's control and access to information. The *Landreth* case decided by the United States Supreme Court supports this conclusion by holding that the sale of all of the stock of a closely held corporation is subject to the anti-fraud provisions of the 1933 Act.

We hold that section 77*l* is applicable to the transaction at issue in this case, a transaction involving the sale by one owner of all of the stock of Herby's.[7] We find nothing in the Texas statute suggesting that it does not also apply. In fact, the language in the Texas statute is arguably broader than the comparable federal language. Accordingly, we hold that the Texas statute should be applied in accordance with our interpretation of the federal statute. We overrule the fifth point of error.

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[7] We do not think that our narrow holding is inconsistent with *Ballay*. The *Ballay* court noted that the House Report indicates that sales akin to new offerings are covered by the 1933 Act. Further, applying the Act to such sales does not eliminate the usefulness of section 78j(b) and rule 10b-5, which will remain applicable to secondary sales of securities on exchanges and over-the-counter markets.

NEGLIGENT MISREPRESENTATION

We have previously held that Summit and Dunnam-Snyder's claims of negligent misrepresentation are barred by the release agreement. Therefore, all relief awarded based on those claims must be reversed. Accordingly, we need not address points of error six through ten.

REIMBURSEMENT

In points of error eleven, twelve, and thirteen, Campbell Taggart and Anheuser-Busch contend that the trial court erred in disregarding jury findings supporting recovery on the reimbursement agreement regarding the cost of processing disclosed insurance claims. They maintain in the fourteenth point of error that the trial court erred in refusing to render judgment for Campbell Taggart and Anheuser-Busch because there is no evidence or insufficient evidence to support the jury's findings of estoppel.

A. Applicable Law

The applicable rule on appellate briefing states:

> A brief of the argument may present separately or grouped the points relied upon for reversal. The argument *shall* include: (1) a fair, condensed statement of the facts pertinent to such points, *with reference to pages in the record where the same may be found;* and (2) *such discussion of the facts* and the authorities relied upon as may be requisite to maintain the point at issue.

TEX. R. APP. P. 74(f) (emphasis added). An appellant bears the burden of discussing its assertion of error and pointing

the appellate court to the portions of the record that support a complaint that jury answers are unsupported by evidence. *Barham v. Turner Constr. Co.*, 803 S.W.2d 731, 740 (Tex. App.--Dallas 1990, writ denied). An appellate court has no duty to search a voluminous record without guidance from the appellant to determine whether an assertion of reversible error is valid. *Id.*; *Most Worshipful Prince Hall Grand Lodge v. Jackson*, 732 S.W.2d 407, 412 (Tex. App.--Dallas 1987, writ ref'd n.r.e.) (en banc).

B. Application of Law

Although the jury made findings favorable to the reimbursement claim, it also made findings that Campbell Taggart and Anheuser-Busch were estopped from asserting the claim. Although Campbell Taggart and Anheuser-Busch attack the findings of estoppel, they provide no argument on the assertion that the findings are unsupported by evidence. Campbell Taggart and Anheuser-Busch do nothing more than summarily state that "there was no or insufficient evidence to support those findings," citing only to the jury findings themselves. There is no reference to the circumstances surrounding the reimbursement agreement. Essentially, there is no briefing of their contention. Because Campbell Taggart and Anheuser-Busch have waived the errror asserted in the fourteenth point of error, we overrule points of error eleven through fourteen.[8]

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[8] Summit and Dunnam-Snyder respond to point fourteen by arguing that the substantial evidence of material misrepresentations supports the jury's estoppel findings. As discussed previously in this opinion, we determined that the evidence supported the jury's findings of material misrepresentations.

COVENANT NOT TO COMPETE

Campbell Taggart and Anheuser-Busch argue in the fifteenth point of error that the trial court erred in refusing to direct a verdict and refusing to render judgment in their favor for breach of the covenant not to compete. Campbell Taggart and Anheuser-Busch contend that the agreement was breached as a matter of law. Alternatively, they maintain that the jury finding of no breach is against the great weight and preponderance of the evidence. Summit and Dunnam-Snyder argue in their second cross-point of error that any breach was excused because of impossibility of performance.

A. Pertinent Facts

Summit, Campbell Taggart, and Anheuser-Busch entered into an agreement in which Campbell Taggart and Anheuser-Busch agreed not to compete with Herby's. Summit agreed to cause Herby's to pay $500,000 in five annual installments of $100,000 to Campbell Taggart and Anheuser-Busch. Herby's paid only the first installment of $100,000. Herby's went into bankruptcy about three weeks before the second installment was due to be paid. The jury found that Summit neither breached nor repudiated the covenant not to compete agreement.

Questions asking about the affirmative defenses of estoppel, failure of consideration, and impossibility of performance were also submitted to the jury. However, because answers to those questions were conditioned upon affirmative findings of breach or repudiation, the jury did not answer the questions.

B. Applicable Law

We have previously discussed the standards of review for legal and factual insufficiency points. Because Campbell Taggart and Anheuser-Busch had the burden of proving breach of the covenant not to compete, they are asserting "matter of law" points and "against the great weight and preponderance" points. *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). A party asserting a "matter of law" point must surmount two hurdles. First, the record is examined for any evidence supporting the jury's finding, disregarding all evidence to the contrary. Second, if there is no evidence to support the finding, the entire record must be examined to see if the contrary proposition is established as a matter of law. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982).

C. Application of Law

The record shows that it was undisputed that the 1988 payment of $100,000 was made. It was also undisputed that Summit did not cause Herby's to make any of the remaining payments due under the covenant not to compete. Finally, it was undisputed that Campbell Taggart and Anheuser-Busch did not compete against Herby's. Thus, there was no evidence supporting the jury's finding that Summit did not breach the contract. Further, the fact that Summit did breach the agreement was established as a matter of law.

However, Summit raised affirmative defenses of estoppel, failure of consideration, and impossibility of performance. Because the legal question of whether there was a breach of the covenant not to compete was

improperly submitted to the jury,[9] no findings were obtained upon these affirmative defenses.[10] Although Summit maintains that impossibility was established as a matter of law, we determine, based on the briefs and the record, that we cannot decide the issue as a matter of law. Thus, although we find that breach of the agreement was established as a matter of law, we conclude that we cannot render judgment on any of the affirmative defenses.[11] Accordingly, the issues regarding affirmative defenses to Summit's breach of the covenant not to compete must be remanded for further proceedings. The associated issues of entitlement to attorney fees must also be remanded. We sustain in part the fifteenth point of error, and we overrule the second cross-point.

ATTORNEY FEES

In their sixteenth and seventeenth points of error, Campbell Taggart and Anheuser-Busch contend that the trial court erred in failing to award them attorney fees. They argue that Summit and Dunnam-Snyder's contractual liability under the reimbursement agreement and covenant not to compete was conclusively established. Campbell Taggart and Anheuser-Busch also maintain that the jury's finding of no reasonable attorney fees is against the great weight and preponderance of the evidence.

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9 See our prior discussion concerning waiver of the defense of release.

10 We do not agree with Summit's assertion that the findings of estoppel made in connection with other claims can be imported as a defense to the claim of breach of the covenant not to compete.

11 Summit also argues that the covenant not to compete is unenforceable because the findings of fraud vitiate the agreement. On the briefs and record before us, we do not think that this issue is ripe for resolution as a matter of law. If Summit wishes, it may pursue the issue upon retrial following remand.

We have determined that Campbell Taggart and Anheuser-Busch waived any error regarding the jury's finding that they were estopped from recovery on the reimbursement agreement. We have also concluded that the issues concerning affirmative defenses to breach of the covenant not to compete must be remanded for further proceedings. As noted above, the right to attorney fees in connection with Summit's breach of the covenant not to compete must be resolved along with resolution of the issues concerning Summit's affirmative defenses. Accordingly, we overrule the sixteenth and seventeenth points of error.

PREJUDGMENT INTEREST

In the eighteenth point of error, Campbell Taggart and Anheuser-Busch argue that the trial court erred in awarding prejudgment interest compounded annually. They contend that simple interest is statutorily required. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 6(g) (Vernon Supp. 1993). Summit and Dunnam-Snyder disagree, and they argue in their third cross-point of error that the prejudgment interest awarded should be based on equity and increased by daily compounding.

A. Applicable Law

Section 6 of article 5069-1.05 is the result of 1987 tort reform legislation and codifies *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985), with some modifications. John T. Montford & Will G. Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System*, 25 Hous. L. Rev. 59, 102-03 (1988). By its terms, section 6 applies only to wrongful death, personal injury, and property damage tort cases. *Id.*; *see Olson v. Bayland Publishing, Inc.*, 781 S.W.2d 659, 666-67 (Tex.

App.--Houston [1st Dist.] 1989, writ denied); *Crocker Nat'l Bank v. Ideco Div. of Dresser Indus., Inc.*, 739 F. Supp. 338, 340-41 (S.D. Tex. 1990) (applying Texas law), *aff'd*, 956 F.2d 265 (5th Cir. 1992). In contrast with the statutory enactments, Cavnar holds that equitable prejudgment interest is to be compounded daily. *Cavnar*, 696 S.W.2d at 554.

The Texas Legislature's codification and modification of *Cavnar* and its progeny in wrongful death, personal injury, and property damage cases did not purport to provide a statutory framework for prejudgment interest in all cases. In section 2 of article 5069-1.05, the legislature provided for interest to accrue on "all judgments." TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 2 (Vernon Supp. 1993). In section 6, however, the legislature specifically limited statutory prejudgment interest under that article to "[j]udgments in wrongful death, personal injury, and property damage cases." *Id.* § 6(a). If the legislature had intended to codify the award of prejudgment interest in all cases, section 6(a) would read "all judgments." The legislature's intent to limit the types of cases to which section 6 applies is exemplified by the addition of section 7, which specifically provides for prejudgment interest in condemnation cases. *See id.* § 7.

Wrongful death, personal injury, and condemnation are not at issue in this case. Thus, section 6 of article 5069-1.05 is applicable only if property damage is in issue. "[P]roperty damage" as used in section 6 of article 5069-1.05 means damage to tangible property, not economic loss or loss of economic opportunity. *Spangler v. Jones*, No. 05-92-01472-CV, slip op. at 14-15 (Tex. App.--Dallas May 25, 1993, n.w.h.) (en banc); *Associate Tel. Directory Publisher, Inc. v. Five D's Publishing Co.*, 849 S.W.2d 894, 900 (Tex. App.--Austin 1993, no writ).

B. Application of Law

The damages which were in issue in this case do not constitute "property damage" as that term is used in section 6 of article 5069-1.05; therefore, *Cavnar* controls the awarding of prejudgment interest. *Id.* The trial court erred in awarding prejudgment interest to be compounded annually. Pursuant to *Cavnar*, prejudgment interest to be compounded daily should have been awarded. Summit and Dunnam-Snyder's third cross-point of error is sustained. We overrule Campbell Taggart and Anheuser-Busch's eighteenth point of error.

DISPOSITION

We reverse that part of the trial court's judgment rendered in favor of Dunnam-Snyder, and we render judgment that Dunnam-Snyder take nothing. We modify the award of prejudgment interest to Summit to the extent that it provided for compounding annually. Consistent with this opinion, we modify the trial court's award of prejudgment interest to provide for compounding daily. In all other respects, we affirm that part of the judgment rendered in favor of Summit.[12] Further, we render judgment that Summit breached the covenant not to compete as a matter of law, and we remand this cause to the trial court solely for (1) recomputation of the prejudgment interest award in accordance with this opinion, (2) adjudication of any issues concerning Summit's affirmative defenses to the breach of the covenant not to compete, and

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[12] We do not reach Summit's first cross point of error as it was conditioned upon reversal of the award in favor of it.

(3) resolution of the question of entitlement to damages and any attorney's fees in connection with the claim that Summit breached the covenant not to compete. *See* TEX. R. APP. P. 81(b)(1), (c).

/S/
WILL BARBER
JUSTICE

Publish
Tex. R. App. P. 90

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC.,

Appellants

No. 05-92-00389-CV V.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY,

Appellees

Appeal from the 160th Judicial District Court of Dallas County, Texas (Tr. Ct. No. 88-13482-H).

Opinion delivered by Justice Barber, Justices Baker and Chapman also participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** in part, **AFFIRMED** in part, **MODIFIED**, and **REMANDED** as follows. That part of the trial court's judgment rendered in favor of The Dunnam-Snyder Company is **REVERSED**, and judgment is **RENDERED** that the Dunnam-Snyder Company take nothing. That part of the trial court's judgment awarding prejudgment interest, *compounded annually*, to Summit Coffee Company is **MODIFIED** to provide that the prejudgment interest awarded to Summit Coffee Company should be *compounded daily*. Judgment is

further **RENDERED** that Summit Coffee Company breached the covenant not to compete as a matter of law. This cause is **REMANDED** to the trial court solely for (1) recomputation of the prejudgment interest award with *daily compounding* from October 26, 1987, through October 9, 1991; (2) adjudication of any issues concerning Summit Coffee Company's affirmative defenses to its breach of the covenant not to compete; and (3) resolution of damages and entitlement to any attorney fees in connection with the claim of breach of the covenant not to compete. In all other respects, the judgment of the trial court in favor of Summit is **AFFIRMED**.

It is **ORDERED** that appellants Anheuser-Busch Companies, Inc. and Campbell Taggart, Inc. recover their costs of this appeal from appellees Summit Coffee Company and The Dunnam-Snyder Company. The obligations of Gardere & Wynne, a Registered Limited Liability Partnership, as surety on appellants' cost bond are **DISCHARGED**.

Judgment entered June 9, 1993.

/S/
WILL BARBER
JUSTICE

APPENDIX C

No. 88-13482

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC.,	§	IN THE DISTRICT COURT
Plaintiffs,	§	OF DALLAS COUNTY, TEXAS
v.	§	
SUMMIT COFFEE COMPANY, ET AL.,	§	
Defendants.	§	160TH JUDICIAL DISTRICT

FINAL JUDGMENT

On July 8, 1991, Plaintiffs Anheuser-Busch Companies, Inc. ("Anheuser-Busch") and Campbell Taggart, Inc. ("Campbell Taggart") (collectively the "Plaintiffs") and Defendants Summit Coffee Company ("Summit Coffee"), The Dunnam-Snyder Company ("Dunnam-Snyder"), The Snyder Company, William K. Snyder, Sam W. Dunnam, III, Sam W. Dunnam, Jr., S. W. Dunnam Trust Estate, Louise M. Dunnam Trust Estate, Sam W. Dunnam, III Trust, Mr. and Mrs. Samuel Dunnam, Jr. Trust of 1979, and the Snyder Children's Trust of 1984 (collectively the "Defendants") appeared by their attorneys of record and announced ready

for trial. A jury consisting of twelve good and lawful jurors was duly impaneled and the case proceeded to trial.

At the conclusion of the evidence, the Court submitted the case to the jury on general questions. The charge of the Court, including the general questions and the verdict of the jury, are incorporated herein for all purposes by reference. The Court, having considered the jury's verdict and the post-trial motions filed by the parties, is of the opinion that Summit Coffee and Dunnam-Snyder are entitled to recover judgment against Anheuser-Busch and Campbell Taggart as set forth below; it is therefore

ORDERED that Summit Coffee have and recover judgment against Anheuser-Busch and Campbell Taggart, jointly and severally, in the sum of $5,500,000.00 together with prejudgment interest on the $5,500,000.00 at the rate of 10.00% per annum compounded annually from October 26, 1987, through the date prior to judgment in the sum of $2,529,870.00 for a total of $8,029,870.00; it is further

ORDERED that Summit Coffee have and recover judgment against Anheuser-Busch and Campbell Taggart, jointly and severally, for attorney's fees in the sum of $200,000.00 for services rendered through the trial of this case, and the further sum of $20,000.00 in the event of an appeal to the Court of Appeals, and the further sum of $10,000.00 in the event of an application for writ of error to the Supreme Court of Texas, and the further sum of $10,000.00 in the event of an appeal to the Supreme Court of Texas if writ is granted; it is further

ORDERED that this award of attorneys' fees is part of the judgment hereby rendered; it is further

ORDERED that Dunnam-Snyder have and recover judgment against Anheuser-Busch and Campbell Taggart,

jointly and severally, in the sum of $4,000,000.00 together with prejudgment interest on the $4,000,000.00 at the rate of 10.00% per annum compounded annually from September 7, 1989, through the date prior to judgment in the sum of $885,467.00 for a total of $4,885,467.00; it is further

ORDERED that Dunnam-Snyder have and recover judgment against Campbell Taggart in the sum of $200,000.00 for punitive damages; it is further

ORDERED that Dunnam-Snyder have and recover judgment against Anheuser-Busch in the sum of $200,000 for punitive damages; it is further

ORDERED that the judgment hereby rendered shall bear interest at the rate of 10.00% per annum compounded annually on all sums herein awarded from the date of judgment; it is further

ORDERED that all costs of court expended or incurred in this case are hereby taxed and adjudged against Anheuser-Busch and Campbell Taggart, jointly and severally, and all writs and processes necessary for the enforcement and collection of this judgment or the costs of court may issue as necessary; and it is further

ORDERED that all other relief not expressly granted herein is DENIED.

SO ORDERED.

SIGNED this 10th day of October, 1991.

/S/
JUDGE PRESIDING